Supreme Court, U.S.
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No. 93-285

In The

Supreme Court of the United States

October Term, 1993

ROBERT A. LEVY,

Petitioner,

vs.

UNIVERSITY OF CINCINNATI,

Respondent.

On Writ Of Certiorari To The Court Of Appeals Of The State Of Ohio First Appellate District

REPLY TO OPPOSITION TO WRIT OF CERTIORARI

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REPLY TO RESPONDENT'S ARGUMENT

I. DID THE PARTIES LITIGATE THE ISSUE OF NOVATION?

Ultimately the only way this Court can determine what issues the parties litigated in the trial and appellate courts is by examining the record. Nevertheless, substantial evidence exists that they did not litigate novation:

A. Language used by the Decision of the Court of Appeals[1]

The Court of Appeals' Decision said:

> "The flaw in the reasoning of the appellant results from his failure to recognize the legal significance of the December letter.
>
> "The December letter is more than a modification of the June letter; it entirely replaces the June letter, and is, in legal effect, a contract of novation offered by U.C. and accepted by the appellant by his action of continuing to teach after the expiration of the period of employment established by the June letter" (Petitioner's Appendix, A7).

The phrase "his failure to recognize the legal significance of the December letter" suggests that the Court of Appeals itself did not believe the issue of novation[2] had been litigated, certainly that the petitioner did not realize

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[1] The Court of Appeals decision is now reported as 84 Ohio App 3d 342, 616 NE 2d 1132 (Ohio App 1 Dist 1992).

[2] It would also go a long way toward proving that the December letter in fact was not a contract of novation.

it had been litigated. See quotation from *State ex rel. Evans v. Bainbridge Township Trustees*, 5 Ohio St 3d 41, 448 NE 2d 1159, 1160 quoted by Respondent (Respondent's Brief 10): "whether they recognized that an unpleaded issue entered the case."

The explanation following, namely, "it entirely replaces the June letter, and is in legal effect a contract of novation" addresses both parties, implying that it was only the Court of Appeals who realized the December letter was a novation, and it was teaching the parties what the case was about.

There is no language such as "we agree with respondent's contention that the December letter replaced the June letter," which would indicate that the issue had been litigated.

B. Characteristics of a novation theory

A novation is a special kind of contract, with several features advantageous to the person claiming it.

1. Because it replaces the earlier contract entirely, it is as if the earlier contract never existed. The Court of Appeals in its Decision took advantage of this by overturning several of petitioner's secondary claims based on the June letter (Petitioner's Brief 15). *But respondent did not avail itself of this advantageous feature* in its arguments, either in the trial court or in the appellate court.

2. Secondly, a contract of novation needs no separate consideration to be valid, since the relinquishment of the earlier obligation serves as consideration for adoption of the later obligation, *Baker v. All States Life Insurance Co.*,

96 NE 2d 787 (1950). The Court of Appeals implicitly recognized this by not addressing the issue of consideration.

The lack of consideration was petitioner's primary argument against the notion that the December letter had any contractual significance. Respondent could have answered petitioner's argument by noting that in a novation the relinquishment of the former contract serves as consideration for the new contract, citing authorities such as *Baker* (supra). But again, *respondent did not utilize this effective argument*. Instead, respondent relied on a unilateral contract theory.

C. Language utilized by the parties

Petitioner can find no use by either party, in the summary judgment or appellate proceedings, of the following words or phrases: in lieu of, replace, cancel, displace, substitute, supercede, or novation (which respondent concedes was never used). Respondent has attempted throughout its Brief in this Court to characterize the arguments in the courts below in terms of these expressions in order to make it appear that novation was litigated, but said words are nowhere to be found in the record. It was not until after the Court of Appeals' Decision of December 16, 1992, that respondent rephrased the earlier arguments in terms of replacement and substitution.

Respondent urged a unilateral contract theory in its arguments. Petitioner argued on the basis of a modification theory, which was fatally flawed by the lack of

consideration. These were the issues the parties recognized, not novation.

A negative is difficult to prove, but all of the above-mentioned indicators suggest that the issue of novation was not litigated by the parties.

D. Argument and evidence regarding novation.

If novation had been an issue in the trial court (Respondent's Brief 12, Ftn 9), petitioner would have argued that the December letter is incomplete (it does not even state petitioner's salary); that it evidences continuity rather than discontinuity; that it requires reference to earlier correspondence; that it lacks notice that the June letter was to be superceded; that it deals with only one issue; that intent, knowledge, and consent could not be established as a matter of law; that separate consideration was necessary because respondent was already bound, making a novation theory inapplicable (See *King Construction Co. v. W.M. Smith Electric Co.*, 530 SW 2d 940, 946 and cases cited therein); that the law of the case eliminated the December letter as a novation. Some of these arguments are summarized in his brief (Petitioner's Brief 15).

As additional evidence, Petitioner would add statements to his affidavit concerning his state of mind at the time he received the December letter: that he regarded the December letter as notice of his first re-appointment pursuant to the June letter; that not having the dean's signature on the December letter made him think that the statements therein concerning tenure could be mistaken and possibly mischievous remarks of whoever it was that

sent the letter; that it would have been dangerous for him to inquire about the puzzling aspects of the December letter; that it never occurred to him that the December letter could constitute a replacement of the June letter.

He would have included as an additional exhibit a letter dated May 23, 1963, dealing with the teaching load.

Because novation theories generally require no separate consideration, the elements of intent, knowledge, and consent to a substitution assume primary importance, *Bolling v. Clevepak Corp.*, 484 NE 2d 1367 (Ohio App 1984). Petitioner should have an opportunity to raise an issue of fact concerning these questions.

II. THE ALTERNATIVE STATE LAW GROUND DOES NOT SUFFICE TO PRECLUDE SUPREME COURT REVIEW OF THE FEDERAL QUESTION.

Contrary to the implication of respondent's argument, it is not enough that an alternative state law ground be merely asserted to preclude this Court from reviewing the federal question. Whether or not this Court has jurisdiction to review the case, this Court does have jurisdiction to "ascertain for itself whether the asserted non-federal ground independently and adequately supports the judgment," *Michigan v. Long*, 103 S.Ct. 3469, 463 US 1032, 77 L Ed 2d 1201 (1983). Although it is doubtful that the "plain statement" rule adopted in *Michigan* would apply in this case because no federal question was initially presented to the state court before it made its decision, nevertheless it is clear that the asserted alternative state law ground is inadequate.

A. The asserted alternative state law ground of decision lacks the breadth to preclude Supreme Court review of the federal due process question.

The case of *Omlor v. Cleveland State University*, 45 Ohio St 3d 187, 543 NE 2d 1238 (Ohio 1989) was decided on narrow grounds. It held that a faculty member could not obtain tenure on a *de facto* basis when the institution had a formal tenure policy which permitted tenure only according to its terms, syllabus (Petitioner's Brief 7). This holding is not broad enough (See *Enterprise Irrigation District v. Farmers Mutual Canal Co*, 243 US 157, 164, 37 S Ct 318, 61 L Ed 644, 648) to apply to petitioner's situation because, as set forth in his Petition (Petitioner's Brief 20), his right to tenure derives not from a *de facto* theory but from a written contract (the June letter) between him and his institution[3]. The only way *Omlor* could be an adequate ground of decision would be if the December letter were indeed a novation, thereby leaving petitioner's claim to tenure resting only on the basis of his years of service, a *de facto* theory. But in that event, the alternative state law

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[3] Additionally, *Omlor* fails to support the judgment of the court of appeals because it is applied retrospectively to petitioner's contract, made twenty-six years earlier. Since the Decision in Appeal-1 (Petitioner's App 20) established the contractual rights set forth in the June letter, *Omlor* comes within the one general exception to the rule of retroactive application of judicial decisions, namely, when contractual rights have been acquired under a prior decision, *Muhlker v. New York & H. R. Co.*, 25 S Ct 522, 197 US 570, 49 L Ed 872, 878 (1905), *Sauer v. New York*, 27 S Ct 686, 206 US 536, 549, 51 L Ed 1176, 1183 (1907), *Zagorski v. South Euclid-Lyndhurst Board of Education*, 471 NE 2d 1378 (Ohio 1984), Ohio Constitution, Art. II Sec 28.

ground would not be independent, since it would depend on the other ground, which is challenged on federal due process grounds.

B. The asserted state law ground was insufficiently developed or articulated in the Decision to preclude Supreme Court review of the federal question.

The Decision of the Ohio Court of Appeals enunciated the alternative state law ground as follows:

> "Further, because U.C. has a formal tenure system, the only way that tenure may be obtained is by formal granting of the board of directors. See *Omlor v. Cleveland State Univ.* (1989), 45 Ohio St. 3d 187, 543 N.E. 2d 1238, syllabus" (Petitioner's App A7).

From this statement it is not clear whether or not the court of appeals intended the alternative ground to be independent[4]. Even though the plain statement rule may not apply here, something more than a single assertive sentence is needed to avoid ambiguity, *Michigan v. Long*, (supra), (ambiguous or obscure adjudications by state courts cannot stand as barriers to a determination by the United States Supreme Court of the validity under the

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[4] It is also likely that this state ground is "a mere device to prevent a review of the decision upon the Federal question," *Enterprise Irrigation District v. Farmers Mutual Canal Co.* (supra), 61 L Ed at 649, in view of the circumstances set forth in the Petition (Petitioner's Brief 19), every word of which, in response to Respondent's remarks (Respondent's Brief 13), petitioner stands behind, including the intentional tort allegations of his original complaint.

federal Constitution of state action). The fact that petitioner *arguendo* may have treated the alternative state law grounds as independent (Respondent's Brief 8) does not make them so. It is what the Court's opinion says that matters, and in this case it says very little. It is interesting to note that the headnotes in the reported opinion, *Levy v. University of Cincinnati*, 616 NE 2d 1132 (Ohio App 1 Dist 1992) do not even mention an alternative ground of decision.

CONCLUSION

For the above-mentioned reasons the petition for Writ of Certiorari should be granted.

Respectfully submitted,

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